## POINT No. 1.

Under point No. 1 petitioner questions the authority of the Circuit Court of Appeals to set aside a jury verdict for inadequacy "where there is no error of law, all facts in support of the verdict being disputed, and the District Judge in the exercise of his discretion having approved the verdict."

As there is no basis in fact in the case to support such a question, it does not deserve or require any consideration on the part of this Court. The question incorporates three statements of fact, or conclusions of petitioner, when none of such facts or conclusions exist. On the contrary, there was an error of law committed by the jury in failing to do its duty to follow the instructions of the Court and allowing Respondent the amount of undisputed actual damage shown in the evidence and which the jury was duty bound to give him if they found in his favor on the question of liability. There was another error of law committed by the trial court in refusing to set aside the verdict of the jury and the judgment of the Court on Respondent's motion for a new trial and to grant Respondent a new trial, where the evidence showed a specific amount of actual damage which was not disputed. All of the facts supporting the verdict were not disputed, but on the contrary, the amount of actual damage was not disputed and petitioner did not contend otherwise either in the District Court or the Circuit Court of Appeals. The District Judge did not approve the verdict by the exercise of his discretion, as he had no discretion under the circumstance in the case and it was his duty to set aside the verdict and judgment for compensatory damages and order a new trial on that issue, and the Appellate Courts have so held.

As stated in the majority opinion of the Court of Appeals (page 40 of petition for writ of certiorari), the Circuit Court of Appeals for the Sixth Circuit, in the case of *Reisberg* v. *Walters*, 111 F. 2d 595, held that the award of a jury in a personal injury case arising out of an automobile accident was grossly inadequate if it failed to consider essential elements of damages in an amount conceded to have been suffered, and demonstrated that the jury had failed to abide by the instructions of the Court. The Court of Appeals further stated that "the Reisberg decision reaffirmed the doctrine of *Pugh* v. *Bluff City Excursion Company*, 177 Fed. 399, 401 (C. A. 6), which held that in case of inadequacy of verdict, such as here presented, it was error of law to overrule the motion for new trial." In this case Judge Learned Hand, speaking for the Court, declared that, while Courts will rarely review a reward for damages, orders refusing new trials because of the amount of the verdict have been reversed in cases where the jury did not attempt to appraise the plaintiff's loss at all and where the verdict was less than the amount of undisputed loss. *C. F. Spero-Nelson* v. *Brown*, 175 F. 2d 86 (C. A. 6), in which the doctrine of the *Reisberg* case, *supra*, was specifically approved.

POINT No. 2.

Under this point petitioner asks a question based upon a premise which does not exist. He asks whether a Federal Appellate Court may set aside a jury verdict and judgment for inadequacy of compensatory damages and reverse for the assessment of compensatory damages only and affirm the same verdict and judgment "where the verdict was entire, was based upon conflicting evidence, was not affected by any error of law, and a motion for new trial was overruled by the trial court."

There is no basis in the case for such a question and it merits no consideration of this Court as (1) the verdict

was not entire. It consisted of three separate verdicts, one on liability, one on compensatory damages and one on punitive damages. (2) The verdicts as to liability and punitive damages were based upon conflicting evidence, but the verdict as to compensatory damages was not based upon conflicting evidence, but upon positive and uncontradicted evidence. (3) The verdict and judgment were affected by an error of law by the trial court refusing to set the judgment aside and grant respondent a new trial on the issue of compensatory damages and an error of law was committed by the jury in failing in its duty to award respondent at least the amount of undisputed actual damages shown by the evidence. (4) A motion for new trial was overruled by the District Judge when it was his positive duty to grant a new trial.

The Circuit Court of Appeals, in the majority opinion (see page 41 of petition for writ of certiorari), made the following statement:

> "While there was controversy as to defendant's liability, there was no controversy as to the necessity of plaintiff's incurring the expenses listed, nor as to the fact that they were actually incurred. The award of $500.00 was around 1/40th of the actual and specific damages proved and nothing was allowed for the undisputed injury shown to have been suffered by plaintiff in his professional reputation, standing and loss of practice.
>
> "While in general the granting of a new trial is a matter of discretion with the Court, it is not so when the verdict is inconsistent on its face. *Pugh v. Bluff City Excursion Company, supra.* The jury found plaintiff was entitled to recover. In view of the undisputed evidence as to the expense caused by the wrongful prosecution it is evident that the jury did not comply with the instructions of the Court.

"As to punitive damages, the award is peculiarly within the discretion of the jury. We cannot say that the discretion was abused, and we do not set aside the verdict of $1.00. * * *."

POINT No. 3.

Under this Point Petitioner asks a question of law which has no application to the case at bar, namely, "May a Federal Court set aside a verdict and judgment for compensatory damages because of inadequacy alone, where applicable State law authorizes the jury to mitigate the damages in accordance with the facts and circumstances of the case?"

There was no such question in the case at bar as the mitigation of damages. No instruction was asked or given on the question of mitigation of damages and no complaint made by Petitioner as to the Court's instructions. No evidence was offered by Petitioner which would justify any mitigation of damages, even if the jury had a right to mitigate the damages. In fact, the petitioner did not even testify in the case.

The cases cited by Petitioner in support of this point and the quotations therefrom set out in the petition, clearly show that they were cases in which the amount or extent of damages could not be exactly calculated, or cases in which the Court failed to properly instruct the jury. In none of those cases was there a verdict for an amount less than the amount of undisputed actual damage proved.

The cases cited and quoted from by the Circuit Court of Appeals in the majority opinion in the case at bar plainly show that the doctrine of mitigation of damages has no place in the case at bar and that the latest cases on the subject in Tennessee and the Circuit Court of Ap-

peals for the Sixth Circuit hold that the jury did not comply with the instructions of the Court and therefore the verdict and judgment must be set aside, so as to correct the finding as to compensatory damages.

POINT No. 4.

Under this point Petitioner seeks to have the question of whether an indictment is conclusive evidence of probable cause further reviewed by this Court, as though the petition were an original appeal. That question was raised in the trial court and the District Judge declared the law to be that in Tennessee and in the Sixth Circuit that evidence of an indictment is merely *prima facie* evidence of probable cause and that in view of the evidence in the case at bar which rebutted the *prima facie* presumption, the matter was for the jury to pass upon. The Circuit Court of Appeals expressly affirmed that finding and cited cases in support of the ruling. In order to try to by-pass that situation Petitioner contends that there was no evidence to rebut the *prima facie* presumption of probable cause and that the Circuit Court of Appeals merely "inferred from evidence of malice that there was an absence of probable cause." He then cites cases holding that malice, alone, is insufficient to show probable cause and that want of probable cause cannot be inferred from malice and then contends there is a conflict in the decisions of the Courts of Appeal on that question. The majority opinion of the Court of Appeals set out in the petition at pages 38 and 39, clearly shows that the Court of Appeals did not merely infer from evidence of malice that there was a lack of probable cause. The Court sets out the facts upon which its finding was based and states that the evidence of such facts was not contradicted. A portion of the statement contained in the opinion is as follows:

"Since defendant for a considerable period as shown by the uncontradicted testimony, accepted the activities of plaintiff and Snakard in Padre's affairs without any claim of fraud and later extorted from Snakard and plaintiff practically their entire interest by threats of prosecution, the inference of good faith and probable cause arising from the indictment was rebutted. The question whether defendant acted in good faith in pressing the indictment in 1954, so long after the civil liability of plaintiff, if any, at least in large degree, had been settled, became a question of fact. Under Tennessee law defendant's failure to testify in the malicious prosecution case warranted an inference of bad faith and want of probable cause. *Bankhead* v. *Hall*, 238 S. W. 2d 522, 527, 34 Tenn. App. 412. The District Court did not err in submitting this issue to the jury."

It therefore appears that even if there were a conflict of decisions of the Courts of Appeal on the question of whether a lack of probable cause can be inferred from evidence of malice, alone, it has no application to the case at bar.

## CONCLUSION.

Respondent respectfully states that he cannot improve upon the statement of facts contained in the majority opinion of the Circuit Court of Appeals or furnish this Court with any later or clearer cases in support of the findings of that Court, than set out in said opinion and therefore he has not engaged in any lengthy discussion of either the facts or the law in the case so as to lighten the burdens of this Court as far as possible.

Respectfully submitted,

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